

THIS OPINION IS NOT
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OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

lms

Mailed: October 28, 2005

Opposition No. 91164102

The Hygenic Corporation

v.

Rudolph International, Inc.

Before Chapman, Bucher and Drost,
Administrative Trademark Judges.

By the Board:

An application has been filed by Rudolph International, Inc. to register the mark HYGIENICS¹ for "manicure kits, namely, nail files, cushioned nail files, emery boards, nail buffing implements and blocks, nail sanders and cuticle sticks all sold as a unit in transparent plastic cases and replacement parts and refills therefore" in International Class 08, and "plastic cases for personal care grooming implements, namely, cases for nail files, cushioned nail files, emery boards, nail buffing implements and locks, nail sanders, cuticle sticks, tweezers, combs, hair clips, nail

¹ Serial No. 78332515, filed November 24, 2003, claiming dates of first use of July 30, 1999 and first use in commerce of August 9, 1999.

scissors and hair curlers all sold empty" in International Class 18.

The Hygenic Corporation has filed a notice of opposition, alleging priority and a likelihood of confusion with six of its registrations which are each for the mark shown below



for a variety of wellness products.² Opposer also alleges that the Board sustained Opposition No. 91120328 on October 2, 2003 (The Hygenic Corporation v. Rudolph International, Inc.) as a discovery sanction, making that order final and unappealed, and giving rise to *res judicata*.

This case now comes up on opposer's motion for summary judgment filed June 1, 2005. As grounds for its motion,

² Registration Nos. 2,262,494; 2,120,982, 1,966,739; 1,380,599; 1,269,061 and 1,241,177.

opposer alleges *res judicata* or claim preclusion.³ The motion has been briefed.

In support of its motion for summary judgment, opposer asserts Opposition No. 91120328 (The Hygenic Corporation v. Rudolph International, Inc.), as the basis for its claim of *res judicata*. Opposer argues that the previous opposition involved the same claim, namely a likelihood of confusion between the same marks; that while the prior proceeding was sustained as a discovery sanction, entry of a default judgment is just as conclusive for purposes of *res judicata*; and that applicant had a full opportunity to litigate the same claim and an adverse final judgment was entered. To establish its allegation that the claims involved are identical, opposer compares applicant's prior application with its current application, and demonstrates that the marks, the identification of goods, and the dates of first use are identical; opposer claims the same registrations in opposing the applications and therefore, the issues presented in the prior proceeding are the same as the issues raised here.

³ In the previous opposition, no issues were actually litigated, the case was sustained by judgment against applicant for applicant's failure to comply with a Board order compelling discovery. Thus, issue preclusion does not apply, and if *res judicata* applies, it can only rest on claim preclusion, that is, the prior judgment bars the same claim.

In its opposition to the motion for summary judgment, applicant argues that in the prior opposition applicant appeared *pro se*⁴; that applicant became very frustrated with the discovery process, and was unable to deal with a discovery impasse that resulted in entry of judgment against it; that, nonetheless, applicant was acting in 'good faith'; and that the doctrine of *res judicata* requires "no triable issue of fact or law, because the matter has been previously determined" and because in the first opposition there was not a trial to determine any facts "therefore, the 'fact' of likelihood of confusion has never been resolved by the TTAB" ("reply" to motion at 2-3).

A review of the evidence shows that both oppositions involve the identical parties and the same claim. In both the old and the new oppositions, opposer challenges Rudolph International's eligibility to register the mark HYGIENICS based on a claim of priority and likelihood of confusion with opposer's HYGENIC (and H design) registrations. Applicant's identified goods in its old and new involved applications are identical. The old opposition resulted in final judgment against applicant, Rudolph International,

⁴ Applicant is now represented by an attorney.

Inc. and in favor of opposer herein, The Hygenic Corporation.⁵

As our primary reviewing court stated recently, under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.

Over the years, the doctrine has come to incorporate common law concepts of merger and bar, and will thus also bar a second suit raising claims based on the same set of transactional facts. Accordingly, a second suit will be barred by claim preclusion if: (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first.

Jet, Inc. v. Sewage Aeration Systems, 223 F.3d 1360, 55 USPQ2d 1854, 1856 (Fed. Cir. 2000) (internal citations and quotation marks omitted).

In this case, we have a previous judgment for Hygenic Corporation against Rudolph International entered as a sanction for repeated failure to comply with discovery orders, which operates as a judgment on the merits. See

⁵ In the old proceeding, the Board sustained the opposition as a discovery sanction against applicant pursuant to Fed. R. Civ. P. 37(d) and Trademark Rule 2.120(g). This was a judgment by default against a party that did not comply with Board orders pursuant to Fed. R. Civ. P. 37(b)(2)(C). Courts have long held that default judgments give rise to *res judicata*. See *International Nutrition Co. v. Horphag Research Ltd.*, 55 USPQ2d 1492, 1494 (Fed. Cir. 2000) and cases cited therein. See generally Wright, Miller & Cooper, 18A *Federal Practice and Procedure Civil 2d* § 4440 (1999).

Goel v. Heller, 667 F.Supp. 144, 150 (D.N.J. 1987).⁶ There is also an identity of the parties; and the current proceeding is based on the same claims that were raised, or could have been raised, in the prior action. See *Amgen, Inc. v. Genetics Inst.*, 98 F.3d 1328, 1331, 40 USPQ2d 1524, 1526 (Fed. Cir. 1996). Rudolph International cannot avoid the bar of *res judicata* on the ground that it was not represented by counsel.⁷

Accordingly, based on our finding that the parties involved in Opposition 91120328 and this proceeding are the same; that the act or occurrence involved in both cases is the same, and that the prior proceeding was sustained, opposer is entitled to judgment as a matter of law based on *res judicata*.

Accordingly, opposer's motion for summary judgment is hereby granted, judgment is entered against applicant, the opposition is sustained, and registration to applicant is refused.

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⁶ In *Goel*, the court entered a judgment for the plaintiff by default and dismissed the defendant's counterclaim, as a sanction for repeated failure to comply with discovery orders and for perjurious responses. This judgment was a judgment on the merits.

⁷ While parties appearing *pro se* may be entitled to some leeway, there remains certain minimum standards that must be met. Parties must comply with basic Board practice and procedure whether they are represented by counsel or not.